No. 12,784

IN THE

United States Court of Appeals

For the Ninth Circuit

HUNG CHIN CHING,
Appellant,

vs.

FOOK HING TONG, CHONG HING TENN and KUI HING TENN,
Appellees.

Upon Appeal from the Supreme Court of Hawaii.

OPENING BRIEF FOR HUNG CHIN CHING, APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an action in equity brought by the Appellant against the Appellees in the Circuit Court for the First Judicial Circuit of the Territory of Hawaii for an accounting of the profits of a certain partnership, to declare a trust and to establish a lien on the partnership assets, and other equitable relief arising out of the same transaction, filed April 5, 1944. (Tr. pp. 3-18.)

After several demurrers and amended bills, a demurrer to the Fourth Amended Bill was overruled and an answer was filed on June 16, 1948 by the

Appellees denying all the material facts alleged. (Tr. pp. 18-20.)

A trial was had thereafter and a decision handed down by the trial judge on August 25, 1948 ordering a decree in favor of the Appellees and against the Appellant. (Tr. pp. 43-48.) A decree was so filed on September 2, 1948. (Tr. pp. 49-50.)

The Appellant appealed from this decree on September 9, 1948 to the Supreme Court of the Territory of Hawaii. (Tr. p. 50.) The trial Court's decision was affirmed by the Supreme Court of Hawaii in an opinion handed down on August 18, 1950. (Tr. pp. 53-69.) The decision on appeal was filed on September 12, 1950. (Tr. pp. 77-80.)

On November 22, 1950, Appellant filed a notice of intention of appeal and a motion for order withholding mandate to the Circuit Court of the First Judicial Circuit, Territory of Hawaii (trial Court). (Tr. pp. 81-82.) An order was issued therefrom staying mandate on November 22, 1950. (Tr. p. 83.)

With the leave of the Supreme Court of Hawaii, affidavit of the Appellant was filed on December 1, 1950, to clarify the amount involved in this case as being more than the $5,000.00 minimum jurisdictional amount required. (Tr. pp. 83-86.)

The papers necessary for the completion of the appeal were filed on December 6, 1950, and the record on appeal from the Clerk of the Territorial Supreme Court was sent to this Court in adequate time. (Tr. pp. 89-104.)

The United States Court of Appeals for the Ninth Circuit has jurisdiction upon appeal from the decision of the Supreme Court of the Territory of Hawaii by authority of Sections 1293 and 1294 (5), Title 28, U.S.C.A.

STATEMENT OF THE CASE.

This is an action in equity. The bill in the present action involves the "Green Mill," a licensed liquor dispensing establishment and a restaurant in Honolulu. It is entitled "A Bill to Declare Trust and Lien, for an Accounting, for Receiver and for Money Judgment." (Tr. pp. 3-13.)

The Appellees, who are all brothers, and the Appellant met one evening in September, 1941 at the home of the Appellees' father in Honolulu. (Tr. pp. 108-112, 171.) They had heard that the "Green Mill" aforementioned was for sale. (Tr. p. 154.) It was decided at the said meeting that they, the Appellant and Appellees, all four were to purchase the said "Green Mill." (Tr. p. 284.) The Appellant and Appellees together went to the home of one Lum Kam Hoo, the proprietor of said Green Mill, to negotiate a purchase of the Green Mill. (Tr. p. 284.) The Appellant and the Appellees agreed to purchase and Lum Kam Hoo agreed to sell the business for the price of "$25,000 plus inventory" (Tr. p. 111) and the purchasers then and there offered said Lum Kam Hoo a token down payment. (Tr. pp. 157, 273.) The payment was refused as being unnecessary and the

Appellant and Appellees were instructed to see Hiram Fong, an attorney, for the necessary papers to complete the sale. (Tr. p. 274.) It was further agreed by the Appellant and Appellees with Lum Kam Hoo that there would be a period when the purchasers would learn to operate the business from the vendor. (Tr. pp. 167-168.) The facts up to this point are not in dispute. With relation to the agreement to purchase the trial Court found:

> "Upon learning that Ching was acquainted with Lum, co-owner, with his wife, of the Green Mill, they all went to Lum's home. After some discussion Lum agreed to sell for $25,000.00 plus the inventory and the Tenn brothers and Ching agreed to buy the Green Mill. A tender of a $200.00 check to bind the agreement was refused by Lum who advised the parties that his attorney, Hiram Fong, would take care of all the details of the sale and transfer of the business, which included an assignment of a lease, the transfer of the liquor license, and an inventory of the stock on hand. Lum further agreed to allow the prospective purchasers to operate the Green Mill while the transfer was being made." (Tr. pp. 44-45.)

The Appellees and the Appellant agreed among themselves in anticipation of the purchase and operation of the Green Mill the shares of the parties and the division of labor. Among other things it was decided that Appellant's share of the purchase price was $3,000.00 and the Appellees were to raise the balance. It was further agreed that Chong Hing Tenn, one of the Appellees, was to take care of the finances

and legal matters, and that the Appellant was to take care of the sales and personnel. (Tr. pp. 240, 286.) As for the foregoing facts, again there is not much dispute. The trial Court found as follows:

> "It was agreed between the parties that upon the formation of the partnership that the active members would be Ching, who would be in charge of the personnel and management of the business, and Chong Hing Tenn who would take care of the finances and any legal matters." (Tr. p. 45.)

From about September 15, 1941 the Appellant and one of the Appellees, Chong Hing Tenn, aided in the operation of the business to learn the business. (Tr. p. 294.) After October 1, the operation was that of the purchasers. (Tr. p. 168.) Appellant was in charge of the personnel and management and Appellee, Chong Hing Tenn, took care of the finances and legal matters. (Tr. pp. 295-297.) Appellant rendered services to about October 20, 1941. (Tr. p. 299.)

Hiram Fong acted as attorney for the sellers of the Green Mill as well as for the purchasers. (Tr. p. 330.) He understood that Appellant was one of the purchasers. (Tr. p. 331.) Chong Hing Tenn, one of the Appellees, gave him most of the instructions. (Tr. p. 338.)

As a result of the operation of the business during the trial period, Appellees learned that the business was a "gold mine." (Tr. pp. 129 and 346.) Appellee Dr. Tong's share from the business for the first three months was $2,000. Chong Hing Tenn, who took care of the financial matters for the purchasers, prohibited

Appellant from looking at the total sales amounts in the cash register. (Tr. pp. 306 and 314.) The business was good and sales amounted to about $600.00 per day. (Tr. p. 306.)

On or about October 6, 1941 one of the Appellees, Dr. Tong, wrote to the Appellant stressing the confidence he had in Appellant and ordering him to run the business in a certain manner. (Tr. pp. 130-132.) On the same date Appellee, Dr. Tong, also wrote to his brother Chong Hing Tenn ordering him to run the business in a certain way. (Tr. pp. 133-135.) The letters were written from Wailuku, Maui, an island several hundred miles away from Oahu where Honolulu is situated. Dr. Tong was then in the army. (Tr. p. 107.) On the same day, October 6, 1941, Attorney Hiram Fong wrote to the liquor commission that the liquor license be transferred to Appellee, Chong Hing Tenn, only; this was changed a few days later and on October 10, 1941 the transfer of the liquor license to the three Appellees was approved. (Tr. pp. 203 and 205.) On October 10, 1941, a bill of sale of the business (Pet. Ex. J, Tr. pp. 248-249) was executed; it was to the Appellees only. Attorney Hiram Fong stated that the minds of the seller and purchasers met as of that day and considered October 10, 1941 as the date of the consummation of the sale. (Tr. p. 337.) The Appellees had in their possession a bill of sale to Appellees only dated October 20, 1941. (Pet. Ex. C, Tr. pp. 161-163.)

After writing the aforementioned friendly letter to the Appellant on October 6, 1941, and while Appellee, Chong Hing Tenn, was maneuvering the transfer,

Dr. Tong on October 9, 1941 wrote to the Appellant to get out and vacate. (Tr. p. 366.)

The total value of the inventory was $10,046.25 (Tr. p. 224), making the total price $35,046.25. A total of $25,000.00 cash was put up by the Appellees (Tr. pp. 374-377) and it was paid on the dates hereinafter indicated to the owners of the Green Mill. To meet the balance of the $10,046.25 a promissory note secured by a chattel mortgage was executed. (Tr. p. 224). The bank records showed that the Appellees raised $25,000.00 by September 30, 1941, paid out $15,000.00 on September 30, 1941, and $10,000.00 on October 9, 1941. (Respondents' Ex. No. 2, Tr. p. 374.)

On October 14, 1941 the three Appellees only signed their formal partnership papers. (Tr. pp. 206-207 and pp. 146-149.)

The lease to the business premises was assigned to the Appellees only on October 30, 1941. (Pet. Ex. G, Tr. pp. 232-233.)

The events which occurred from the time the agreement to purchase was entered to October 20, 1941 are chronologically listed in Argument I of this brief.

Appellant testified that he had $3000.00 available to him by way of a $2,000.00 loan from witness K. C. Wong and $1,000.00 by way of a second mortgage on Appellant's home. (Tr. p. 304.) K. C. Wong's testimony that he was willing to lend Appellant $2,000.00 is unimpeached. (Tr. pp. 191-193.) Appellant testified that he understood that Chong Hing Tenn was in charge of finances and that Chong Hing Tenn was to make demand on Appellant when the

money was needed to consummate the deal but no such demand whatsoever was made. (Tr. p. 303.)

When he first discovered that the sale was made to the Appellees only and that he was not in the partnership, he immediately made a radiophone call to Dr. Tong on Maui. (Tr. p. 299.) The fact that the phone call was made is substantiated by Attorney Hiram Fong's testimony. (Tr. p. 328.)

No legal action was taken immediately because war started on December 7, 1941 and martial law was declared and Appellant believed that there was nothing he could do about it in the courts. (Tr. p. 310.) He saw his attorney in November of 1943. (Tr. p. 312.)

Appellant was represented by Herbert K. H. Lee and David R. Castleman, Jr., in the trial Court and Supreme Court of Hawaii. They both withdrew after the Supreme Court decision (Tr. p. 69) and Appellant is now represented by counsel of record in this Court.

The foregoing is a brief summary of the evidence presented in the trial Court.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Hawaii erred in sustaining the decision and decree of the trial Court.

2. The Supreme Court of Hawaii erred in holding that there was no constructive trust relationship by and between the Respondents-Appellees and the Peti-

tioner-Appellant after the former acquired title to the restaurant business.

3. The Supreme Court of Hawaii erred in holding that there was no partnership relationship existing in spite of the fact that the restaurant business was launched and in active operation from and after October 1, 1941.

4. The Supreme Court of Hawaii erred in holding that the Petitioner-Appellant had no suit for an accounting when he already performed services and had a vested interest in the partnership.

5. That the Supreme Court of Hawaii erred in completely disregarding the fact finding of the trial Court that the Petitioner-Appellant was "squeezed out" by the Respondents-Appellees.

6. The Supreme Court of Hawaii erred in completely disregarding the oral decision of the trial Court which was perfectly consistent with the written decision; that the said oral decision amounted to a finding of fraud practiced by the Respondents-Appellees against the Petitioner-Appellant.

7. The Supreme Court of Hawaii erred in not overruling the trial Court's finding and conclusion that the partnership was never formed and that it was a mere agreement to form a partnership when the evidence showed that there was an actual partnership in operation.

8. The Supreme Court of Hawaii erred in holding for the Respondents-Appellees even though it failed to find that a demand was made by the Respondents-Appellees upon the Petitioner-Appellant.

9. The Supreme Court of Hawaii erred in concluding that from the evidence adduced there was no showing of a partnership.

10. The Supreme Court of Hawaii erred in sustaining the fact findings of the trial Court in so far as they were adopted by the said Supreme Court.

11. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "The record bears no recession or cancellation of the original agreement which entitled the petitioner to participate *in the purchase conditioned upon the payment of his contributive share of $3,000, by any or all of the respondents, or by the petitioner himself.*" (Objectionable portion emphasized.)

12. That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "Under the oral agreement with the seller *fixing the time of payment of the purchase price as October 1, 1941, a limitation of time for performance by the petitioner, during which he was to tender his contributive share, was fixed and agreed upon.*" (Objectionable portion emphasized.)

13. That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "In addition to the fact that the experimental period of operation by the party purchasers was to terminate on October 1, 1941, *during which period the petitioner had ample opportunity to tender*

his contributive share, the evidence further discloses that the sale, by way of execution of all requisite documents and transfers, was not consummated until October 20, 1941, retroactive to October 1, 1941. *The petitioner was, by operation of time and with the acquiescence of the respondents, gratuitously accorded an extra period of dispensation in which to tender his contributive share. During this twenty-day period of additional concession, the petitioner failed to perform, and has not, in our opinion and as found by the trial judge, established any valid reason for his default.''* (Objectionable portion emphasized.)

14. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "The letter of October 6, 1941, from Fook Hing Tong to the petitioner, fourteen days prior to the actual consummation of the sale contains an affirmance that the original agreement between all party purchasers, including the petitioner, was still in effect, though the trial period and *the due date of the purchase price on October 1, 1941, expired six days prior thereto. The period within which the petitioner could have tendered his contributive share was thereby extended to October 20, 1941. Of this extension of time in which to perform, the petitioner was also given notice.''* (Objectionable portion emphasized.)

15. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in this case:

(a) *"The purchase price was payable by the party purchasers on October 1, 1941. The petitioner, as a party to that oral agreement, was aware of and so bound, as were all the party purchasers, by this due date of payment."* (Objectionable portion emphasized.)

16. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) *"The record further discloses that petitioner's right of contribution was expressly conditioned upon tender of his contributive shares as agreed upon. This he failed to do."* (Objectionable portion emphasized.)

17. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "The respondent's *upon petitioner's default,* contributed the sum of $25,000, *which was paid to the sellers as the purchase price of the business as agreed upon.* They thereupon formed and registered a copartnership between themselves excluding the petitioner, *to the end that they, as the remaining party purchasers, would be qualified to render continuity to the operation of the business in conformance with the attending legal requisites. The petitioner failed to tender his contributive share to the enterprises and has given no valid excuse for failing to do so, and was thereby precluded from participating therein as a result of this failure. He has further failed, in this court's opinion upon review of the records, to establish his asserted right to be presently included as a*

member of the copartnership formed on October 20, 1941, retroactive to October 1, 1941." (Objectionable portion emphasized.)

18. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "*The respondents, on the contrary, violated no confidence the petitioner reposed in them, violated no oral agreement entered into between the original party purchasers, displayed no bad faith, nor practiced or perpetrated fraud upon the petitioner in respect of his exclusion from membership in the registered copartnership. They elected to adhere to their original agreement as party purchasers and pursuant thereto contributed their respective shares as agreed upon. They further acquiesced in and accorded the petitioner the extended period of grace above referred to during which time he also failed to perform. He admittedly defaulted.*" (Objectionable portion emphasized.)

19. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "*Upon the entire record on review, whether or not the original oral agreement between the parties to the proceeding constituted a copartnership or joint adventure binding them with the legal incidents flowing therefrom, is not pertinent to the disposition of the issues of facts presented which are determinative of the sole question presented on appeal.*" (Objectionable portion emphasized.)

20. The Supreme Court of Hawaii erred in affirming the following fact finding of the trial Court:

(a) "The respondent Fook Hing Tong then being on the island of Maui, replied to both the petitioner and respondent Chong Hing Tenn on October 6, 1941, and expressly reaffirmed the oral agreement among the party purchasers and reassured the petitioner *that he was to share in the business to the extent of a three-share interest upon the express condition that he make contribution of the amount representing his three-share interest as agreed upon.*" (Objectionable portion emphasized.)

SUMMARY OF ARGUMENT.

1. The Supreme Court of Hawaii erred in holding that the evidence adduced was not sufficient to warrant a finding and conclusion that the Appellees held the title to the Green Mill in constructive trust in favor of the Appellant for Appellant's proportionate share. This argument covers Specification of Errors 2 and 4.

2. The Supreme Court of Hawaii erred in holding that the evidence presented was not sufficient to hold that a partnership existed. This argument covers Specification of Errors 2, 7, 8, 9 and 10.

3. The Supreme Court of Hawaii erred in completely disregarding the interlocutory oral decision and the fact findings made therein by the trial Court. This argument covers Specification of Errors 5 and 4.

4. The Supreme Court of Hawaii erred in holding that tender was necessary under the circumstances and that the Appellant defaulted in making said tender. This argument covers Specification of Errors 8, 11, 12, 13, 14, 15, 16, 17, 18 and 20.

5. The Supreme Court of Hawaii erred in making certain fact findings and conclusions. The particular fact findings and conclusions are referred to in the argument. This argument covers Specification of Errors 11, 12, 13, 14, 15 and 16.

6. The Supreme Court of Hawaii erred in holding that it was not necessary to rule as to whether there was an existing partnership or not. This argument covers Specification of Error 19.

Specification of Error 1 is of a general nature and the entire argument is in support of said specification.

ARGUMENT.

I.

THE SUPREME COURT OF HAWAII ERRED IN HOLDING THAT THERE WAS NO CONSTRUCTIVE TRUST RELATIONSHIP BY AND BETWEEN THE RESPONDENTS-APPELLEES AND THE PETITIONER-APPELLANT.

The trial Court, from the evidence with relation to the negotiations to purchase the "Green Mill," found as follows:

> "Upon learning that Ching was acquainted with Lum, co-owner, with his wife, of the Green Mill, they all went to Lum's home. *After some discussion Lum agreed to sell for $25,000.00 plus the*

*inventory and the Tenn brothers and Ching agreed to buy the Green Mill * * *''* (Emphasis ours.) (Tr. p. 44.)

The trial Court further found:

"The agreement upon which this action is based, was one to form a partnership." (Emphasis ours.) (Tr. p. 48.)

The foregoing emphasized findings were not reversed by the Supreme Court of Hawaii in its decision. (Tr. pp. 53-67.) The Supreme Court of Hawaii and the trial Court in rendering their respective decisions stepped out on the wrong foot because both were led to believe that since there was no partnership but a bare agreement to form a partnership, the usual rule of fiduciary relationship between partners was not applicable. It is submitted that the rule of fiduciary relationship between partners applies not only when there is a partnership but also when there is an agreement to form a partnership. The rule is well stated in 40 *Am. Jur.* 217, paragraph 128:

"The relationship of partners is fiduciary and imposes upon them the obligation of utmost good faith and integrity in their dealings with one another with respect to partnership affairs. * * *''

"The duty of good faith exists also between persons who are about to become partners, and between those who have been partners and who are still engaged in the process of winding up the firm affairs * * *'' (Emphasis ours.)

In *Zogg v. Hedges,* 126 W.Va. 523, 29 S.E. (2d) 871, the Court held, on page 527:

> "* * * They plainly base their bill on the universal rule that partners must deal with each other openly and in the utmost good faith. This principle of common honesty covers not only transactions after the partnership is established but *those taking place during negotiations toward partnership.*" (Emphasis ours.)

In the oft-cited case of *Densmore Oil Co. v. Densmore* (1870), 64 Pa. State Reports 43, the Court held:

> "* * * It is a familiar principle of the law of partnership, one partner cannot buy and sell to the partnership at a profit; nor, *if a partnership is in contemplation merely,* can he purchase with a view to a future sale without accounting for the profit." (Emphasis ours.)

See, also:

Kimberly v. Arms, 129 U.S. 512, 52 L. Ed. 764, 9 S. Ct. 355;

Wetzel v. Jones, 75 W.Va. 271, 84 S.E. 951;

Fouse v. Shelly, 64 W.Va. 425, 63 S.E. 208;

Engeman v. Taylor, 46 W.Va. 669, 33 S.E. 922;

Kroll v. Coach, 45 Or. 459, 78 P. 397.

The Supreme Court of Hawaii and the trial Court did not even discuss the rule of fiduciary relationship between partners or persons who are about to become partners. Both Courts below considered Appellant and Appellees as strangers and no "extra duties" of persons in fiduciary relationship were imposed on the Appellees. Although a transaction between strangers

may not be questioned, once fiduciary relationship is established the same transaction may be impeached because of such relationship. In *Hall v. Wynam,* 14 Hawaii 306, at page 310, it is stated:

> "* * * 'Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.*'" (Emphasis ours.)

In 40 *Am. Jur.* 217, paragraph 128, the fiduciary relationship among partners is well defined:

> "The relationship of partners is fiduciary and imposes upon them the obligation of the utmost good faith and integrity in their dealings with one another with respect to partnership affairs. Hence, partners must refrain from making any false representations to each other. And where, in transactions connected with the partnership business, one partner obtains an undue advantage over a copartner by false representations, equity will grant relief to the defrauded party.
>
> "The objection of good faith imposes upon the partners more than a duty to refrain from making false representations to each other. The partners must not deceive one another by concealment of material facts. *Since each is the confidential agent of the other, each has a right to know all*

that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs. Under statutory provision in most jurisdictions, partners must render on demand true and full information of all things affecting the partnership to any partner or partners or the legal representative or any deceased partner or partners under legal disability.

"The duty of good faith exists also between persons who are about to become partners, and between those who have been partners and who are still engaged in the process of winding up the firm affairs. *It involves also the obligation on each partner in acting for the partnership to consult his copartner in every important exigency in the partnership affairs,* in the absence of special circumstances excusing him from so doing." (Emphasis ours.)

See, also:

Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732;
Patrick v. Bowman, 149 U.S. 411, 37 L. Ed. 790, 13 S.Ct. 811;
Goldsmith v. Koopmen (C.C.A. 2), 152 F. 173;
Whitney v. Dewey (C.C.A. 9), 158 F. 385.

The fact that there were strained relationships between one of the Appellees, Chong Hing Tenn, and the Appellant did not diminish the fiduciary relationship. It is stated in 40 *Am. Jur.* 219, paragraph 130, as follows:

"The duty or obligation of partners to act with the utmost candor and good faith in their dealings as between themselves is not to be lessened

by the fact that during negotiations for the purchase of one partner's share by another the relations between them became strained, for the obligation remains until the relation is terminated. Thus, the mere fact that strained relations had grown up between the partners, and that a suit for an accounting and dissolution, filed by the partner who later bought his copartner's interest, had been pending for some time prior to such purchase, did not relieve the purchasing partner of his duties as a fiduciary, or justify him, even in the absence of conscious fraud, in dealing with his copartner as a stranger."

See, also:

Arnold v. Maxwell, 223 Mass. 47, 111 N.E. 687;

Lindquist v. Peterson, 134 Minn. 279, 158 N.W. 426;

Wright v. Duke, 91 Hun. 409, 36 N.Y.S. 853;

Johnson v. Peckham, 132 Tex. 148, 120 S.W. (2d) 786, 120 A.L.R. 720.

The trial Court in its decision found that:

"It was agreed between the parties that upon the formation of the partnership that the active members would be Ching, who would be in charge of the personnel and management of the business, *and Chong Hing Tenn would take care of the finances and any legal matter."* (Tr. p. 45.)

The foregoing findings are repeated in the Supreme Court decision and said findings remained undisturbed. (Tr. p. 61.) In other words, Appellee, Chong Hing Tenn, was to take care of the legal matters of the proposed partnership. He thus became an agent

for such purpose for the Appellant and the two remaining Appellees. Clothed with the fiduciary duties above indicated, he was charged with a duty to carry out his duties in good faith.

In *Kroll v. Coach,* 45 Or. 458, 78 P. 397, at 399, the Supreme Court of Oregon in deciding a case involving joint adventurers, wherein the plaintiffs and defendant were joint purchasers of land, stated:

> "In the legal aspect of the case, the defendant assumed a relation of trust and confidence toward plaintiffs. His position was such that he had exclusive knowledge of subsisting conditions affecting the venture that he proposed, and the plaintiffs were dependent entirely upon his representations, and relied upon them. In effect, he acted as their agent, as well as for himself, in negotiating and consummating the purchase from the original holders of the land to which they subsequently acquired the title in their own right. Such a relation enjoined upon the defendant absolute good faith toward the plaintiffs, and he was in duty bound, in law as well as in ethics, to disclose to his principals all the knowledge attending the transaction that he possessed. If he had been dealing with them at arm's length, as his theory of the case would imply—that is, if he had been selling to them, instead of buying for them—the duty would have been otherwise. But he was not. He occupied the position of negotiating a joint purchase for the three, including the plaintiffs and himself, and plaintiffs were entitled to all the advantages jointly with him that he contracted for under his option with the original holders. * * *"

"* * * Agency is a fiduciary relation, which is one of trust and confidence, and 'the same observations apply,' says Mr. Perry in work on Trusts (vol. 1 (4th Ed.) section 206), 'as to other relations of trust and confidence.' He further observes: 'No person whose duty to another is inconsistent with taking an absolute title to himself will be permitted to purchase for himself, for no one can hold a benefit acquired by fraud or a breach of his duty. All the knowledge of the agent belongs to the principal for whom he acts, and, if the agent use it for his own benefit, he will become a trustee for his principal.' With reference to the same subject Mr. Beach says: 'This is a fiduciary relation, and the principles of equity by which the relations of a trustee to his beneficiary is governed apply to the relation of an agent to his principal. It is well settled that any person sustaining a fiduciary relation toward another in regard to property is bound to make use of all the knowledge, to improve all the opportunities, to exercise all the powers and rights of every description that he has derived from his fiduciary position, or has acquired by means of it, for the benefit of his cestui que trust. And on the same principle he may not avail himself of these advantages to promote his own interest. The rule is inflexible that in every case in which a person is either actively or constructively an agent for others, all the profits and emoluments secured by him in the business inure to the benefit of the employer.' 1 Beach, Trusts & Trustees, section 192 * * *"

It is respectfully submitted that Chong Hing Tenn's actions show that he breached every fiduciary

duty imposed on him. In the first place, the same attorney, Hiram Fong, who represented the Appellees in a letter addressed to the Liquor Commission on October 6, 1941 requested the transfer to Appellee, Chong Hing Tenn, only. (Tr. p. 202.) The secretary of the Liquor Commission later wrote in the names of the two other Appellees, Doctor Fook Hing Tong and Kui Hing Tenn. (Tr. p. 203.) A few days before October 9, 1941 (Tr. p. 203), but after the above-mentioned October 6th letter was received (Tr. p. 204), Liquor Inspector Henry N. Thompson investigated the case and on October 9, 1941 made his report (Tr. p. 203). The following is the report:

"Petitioner's Exhibit E

Rec'd by Liquor Commission on October 10, 1941.

Inspector's Report

"By a mutual verbal understanding with a very intimate friend, Mr. Chong Hing Tenn was in partnership with one named James Omura, doing business as the Hai Liquor House, exercising a retail beer and wine, and a dispenser beer and wine licenses, from 1937 to 1939, when the business was sold to John Rochas, in May 1939, for $650.00. This business was a separate unit from that of the Tong Fat Tenn Store. Since leaving the plantation in 1940 he has been in his father's store, which he has operated as his own.

"Purchase price is $25,000.00 cash. *The applicant has $10,000.00 of his own. His brother, Doctor Fook Hing Tong is advancing $10,000.00 and another brother, Doctor Kui Hing Tong, $5,000.00, and are his backers, starting him in*

business. This is a family business affair, and eventually may combine all brothers later.

"There is about 4 years left to the present lease which expires in 1945. Rental now is $350.00, of which the Metronome Music Store pays $130.00, being that they have acquired a portion of the original premises.

"This is a bona fide restaurant, that is well patronized during meal hours, and *we believe that Mr. Chong Hing Tenn, will be a satisfactory licensee.* He is an experienced business man, and is to be assisted by Mr. Ching, at present a Sergeant in the Police Department, who will retire therefrom. Although the present licensee and her husband have been conducting this place in a satisfactory manner, we believe the transfer will be an improvement. We recommend that the request to transfer be granted.

Respectfully submitted,

CLAUDE K. MALANI,
Chief Inspector.

/s/ HENRY N. THOMPSON,
Assistant Chief Inspector."

(Tr. pp. 210-211.) (Emphasis ours.)

Liquor Inspector Henry N. Thompson testified as follows:

"Q. What was the first thing that came to the attention of the liquor commission considering the premises in relation to the transfer of this liquor license to these people from Mr. Lum?

A. The request by Mrs. Lum to transfer the license *to Mr. Chong Hing Tenn.* There is a letter in here dated the 6th of October, 1941." (Tr. p. 202.)

"Q. Now, as a part of this entire report there is Mr. Milani and your particular inspector's report. I will ask you to look at this same report. That is taken from your report, excluding the top part, which consists of or contains (92) the personal history of Chong Hing Tenn.

A. It is part of our report.

Q. That is part of your report?

A. Yes.

Mr. Lee. Is there any objection?

Mr. Waddoups. May I ask a question or two about it?

Mr. Lee. Certainly. Go ahead.

Cross-Examination

By Mr. Waddoups. Q. At the time of your report, copies of which I have here, which was dated October 10, 1941, you were addressing yourself to the proposition of Mr. Chong Hing Tenn taking the license individually, were you not, and not of the copartnership?

A. That I don't remember, how the copartnership came in, but I think it was done by our secretary. I can't remember back.

Q. But your reports relate only to Chong Hing Tenn?

A. That is right.

Q. That's correct. But so far as the present licensee is concerned, or the prospective licensee is concerned, on whom you sent in a report, that was addressed solely to Chong Hing Tenn?

A. Yes.

Q. *That did not at the time contemplate a copartnership, is that correct?*

A. No, sir.

Mr. Waddoups. We will object to it, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial, not binding on the other two respondents. It is addressed solely to the individual. We realize that is (93) a court of equity, and the court can sift the equity properly, but we do not want the record to appear that we are waiving any rights we have in that connection.

The Court. I can't very well rule on it unless I know what it is all about. The report will be received in evidence, over counsel's objection, and marked Exhibit E. It is understood that this is a copy from the reports of the liquor commission. I understand that there is no objection on the ground that it is just a copy from their records.

Mr. Waddoups. No. There is no objection on that ground.

The Court. Very well." (Tr. pp. 208-210.)

The foregoing evidence, never explained by Appellee, positively shows that Chong Hing Tenn intended to take the liquor license in his name only, even to the extent of double-crossing his own brothers.

The intent of Appellee, Chong Hing Tenn, to take the business in his name only is further evidenced by Appellee Dr. Fook Hing Tong's letter of October 6, 1941 to Appellant. (Petitioner's Exhibit A, Tr. pp. 130-132.) The following is the statement in the letter:

"So hold the contract and let Hiram Fong (attorney) know that I (Dr. Fook Hing Tong) want my share in that business and not to put his

(Chong Hing Tenn's) name in the whole shee bang * * * Better put it in Black and White and tell Long John to hold out consummating the business." (Identifying insertions ours.) (Long John is the husband of owner of Green Mill.)

In the letter dated October 6, 1941, marked Petitioner's Exhibit B (Tr. pp. 133-135), from Appellee Dr. Fook Hing Tong to Appellee Chong Hing Tenn, it is stated:

"If you think you can handle the place by yourself you can have my intere shares but I cannot afford to spare that much cash for you to promote any business."

In other words, Chong Hing Tenn's attempt to take the place only by himself was known to Appellee Fook Hing Tong as early as October 6, 1941, though Dr. Fook Hing Tong was on Maui.

Attorney Hiram Fong testified that:

"Q. Chong Hing Tenn, he was the one that gave you most of the instructions?

A. Yes." (Tr. p. 338.)

The said attorney further testified:

"Q. These instructions that you had of who the partners were came from Chong Hing Tenn primarily, is that right?

A. Yes." (Tr. p. 342.)

Therefore, Appellee Chong Hing Tenn's first attempt to get the liquor license in his name only, was a direct breach of his fiduciary duties. Evidently he

later changed his mind and had the liquor commission secretary insert the names of his two Appellee brothers. (Tr. p. 203.) In chronological order, the following matters happened which were within Appellee Chong Hing Tenn's knowledge:

September 29, 1941. Dr. Fook Hing Tong and Kui Hing Tenn raised their $15,000.00. (Tr. p. 374.)

September 30, 1941. Above $15,000.00 paid to owners of "Green Mill." (Tr. p. 376.)

September 30, 1941. $10,000.00, sum by Chong Hing Tenn readied and deposited with Kui Hing Tenn. (Tr. p. 374.)

October 6, 1941. Attorney Hiram Fong wrote letter to Liquor Commission to transfer license to Chong Hing Tenn only. (Tr. p. 202.)

October 7 or 8, 1941. Liquor inspectors questioned Chong Hing Tenn about transfer to him only. (Tr. p. 203.)

October 9, 1941. Liquor inspector's report filed. (Tr. p. 203.)

October 9, 1941. $10,000.00 paid to owners of Green Mill, bank statement. (Tr. p. 374.)

October 10, 1941. Green Mill transferred by duly signed bill of sale. (Tr. p. 248.)

October 10, 1941. Liquor Commission meeting held and transfer to only 3 Appellees approved. (Tr. p. 160.)

October 11, 1941. Liquor Commission wrote to Attorney Hiram Fong, Appellees' attorney, regarding approval of transfer of liquor license on October 10, 1941. (Tr. pp. 159-160.)

October 13, 1941. Territorial Treasurer's Office report of formation of partnership between 3 Appellees signed. (Tr. p. 207.)

October 14, 1941. Partnership agreement signed by 3 Appellees. (Tr. pp. 146-149.)

October 18, 1941. Chattel mortgage to secure $10,046.25 note to owners of Green Mill was signed. (Tr. pp. 224-227.)

October 20, 1941. Second Bill of Sale signed from owners of Green Mill to 3 Appellees. (Tr. pp. 161-163.)

Appellee Chong Hing Tenn, who was trusted to take care of the legal and business matters, knew all of these things and never informed Appellant of any of these things. Here, again, in not reporting each of these matters to Appellant, Chong Hing Tenn breached his fiduciary duty to the Appellant. Appellant was by law entitled to know each of these material facts leading to the consummation of the deal. There is no question that the above matters were material to the formation of the partnership and Chong Hing Tenn purposely withheld the information. Furthermore, Chong Hing Tenn prohibited the Appellant from looking at the total sales amount on the cash register. (Tr. pp. 306-314.) This very important evidence was never denied. It all points to the fact that Chong Hing Tenn wanted all the business for himself only or else for his family members only.

The Appellant testified (Tr. pp. 303-304) that Chong Hing Tenn never made demand upon him:

"A. I figured what's the use, if they are going to treat me like that, I am going to let their conscience be their guide. That is the way I felt. They are good friends of mine, honorable gentlemen. Why should they do a thing like that to me? I don't like to go to court.

Q. In the testimony of Chong Hing Tenn, particularly, he stated that they were waiting for the money from you. Now, what was the understanding?

A. It was agreed that he was supposed to notify me when the tender is ready.

Q. Who?

A. Chong Hing Tenn, the man in charge of the finances. He was in charge of finances.

Q. He was supposed to let you know?

A. Let me know when the thing was about to be consummated.

Q. Then for you to put up the money, is that it?

A. That's right.

Q. When was that plan agreed to, about?

A. At the first conference at the house.

Q. At the Tenn house?

A. That's right.

Q. Did Chong Hing Tenn ever ask you for that money?

A. He never asked me for the money.

Q. Did you at all times have that money available?

A. Yes.

Q. Where was that money? How was that to be raised?

A. I was going to mortgage my house on a second mortgage for $1,000, and borrow $2,000 from K. C. Wong.

Q. Was K. C. Wong going to let you have it without security?

A. Yes.

Q. Without security?

A. That's right.

Q. Was that true what Mr. Wong said yesterday, or the other day that he loaned you $75 to go up to Maui to see Doctor Tong?

A. I borrowed $75 from him.

Q. Was that without security?

A. No security. He give it to me.

Q. Where were you going to get the loan of $1,000 on a second mortgage?

A. I was going to get a second mortgage from my brother Hung Wai Ching.

Q. He is a realtor?

A. He is a realtor.

Q. Had he agreed to let you have $1,000 any time? Did he have that money?

A. He had."

And he further testified (Tr. p. 316) as follows:

"Q. I call your attention to a letter written to you and signed "Bear," which is identified as Petitioner's Exhibit A, and I will call your attention particularly to a part of the second paragraph, where it says, 'I have 15 shares and you have three, that is if you can get the dong by then.' What is meant by that expression?

A. He meant by getting the money.

Q. After you received this letter, did you produce any money?

A. I was waiting for Mr. Chong Hing to ask for that money.

Q. You didn't go and say, 'When do you want it,' or anything, you waited for them to call you?

A. I was waiting for the consummation of the deal.

Q. At the time when you received this letter, had you completed your loan so that you could get the necessary $3,000?

A. I had already made all arrangements, merely signing the check."

The foregoing testimony of lack of demand was not denied by Chong Hing Tenn. His closest explanation may be the following:

"Q. Where did Mr. Ching come into the picture, if he came in at all?

A. I don't know about him. I didn't do business with him.

Q. Did your brother Fook Hing?

A. Maybe he did; not with me." (Testimony of Chong Hing Tenn, Tr. p. 156.)

In other words, by the foregoing testimony Chong Hing Tenn thought that it wasn't necessary and there was no obligation on his part to report any material facts to the Appellant nor make a demand on the Appellant.

Instead of disclosing all of this information, on or about October 20, 1941, Chong Hing Tenn directed a Bill of Sale to the three Appellees only. It is submitted that a stronger case of a breach of fiduciary duty could not have been presented and the trial Court and the Supreme Court erred in holding that there was no constructive trust. It is elementary that one who acquires property in breach of a fiduciary duty holds such property in constructive trust.

Aldrich v. Hassinger, 13 Haw. 138, at p. 149.

II.

THE SUPREME COURT OF HAWAII ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT THE EVIDENCE PRESENTED DID NOT SHOW A PARTNERSHIP.

The trial Court in its written decision held:

> "The agreement upon which this action is based, was one to form a partnership. It was never formed * * *" (Tr. p. 48.)

The Supreme Court affirmed said findings:

> "Measuring the findings of fact of the trial Judge by affixing the weight attributable to them under the ruling adopted, supra, this Court finds that the evidence warranted the findings made." (Tr. p. 67.)

It is respectfully submitted that both Courts erred in holding that a partnership did not exist under the evidence adduced in the trial Court. The Supreme Court of Hawaii has held, in *Barnes v. Collins,* 16 Haw. 340, at page 342, as follows:

> "What constitutes a partnership is a matter of some diversity of opinion, but in general it may be said that, according to what is called the modern doctrines, *a partnership exists where the parties have contracted to share, as common owners or principals, the profits of a business and that whether an agreement creates a partnership or not depends upon the intention of the parties.* But by the intention of the parties is meant, not what they call or consider the relation into which they enter, but what the relation is in legal effect. The parties may expressly agree that there shall be a partnership and yet such agreement will be ineffective if the specific stipulations do not estab-

lish a partnership as matter of law, and on the other hand they may expressly agree that their relation shall not be that of partners and yet it may be such as matter of law. Perhaps there is no single element that will necessarily show as a matter of evidence that a partnership was intended. Even an express agreement that the parties shall share in the profits and losses will not, it is said, necessarily establish a partnership, but such an agreement would be strong presumptive evidence of a partnership, and even an agreement to share in the profits with no agreement as to the losses would be presumptive evidence of a partnership. If the right to share in the profits is merely by way of compensation in lieu of salary or wages for services performed or of interest for money loaned or of rent for land or of compensation for acting as agent and not by virtue of ownership of the profits, there is not a partnership. The natural inference is, in the absence of a contrary showing, that if one has a right to share in the profits it is because he is a co-owner of the profits. If in addition to a right to share in the profits there is also a liability for losses or expenses the case is greatly strengthened, for agents, or servants or loaners of capital not usually liable for losses or expenses. Of course there need be no partnership name, nor need it be stipulated that there shall be a partnership, nor is it necessary that the partners should understand or realize what the legal consequences of their agreement will be. The question is whether that which they have agreed upon constitutes a partnership as a matter of law; that is, did they agree to become co-owners of the profits?" (Emphasis ours.)

In *Bishop v. Everett,* 6 Haw. 157, at page 158, the Supreme Court of Hawaii adopted Story's definition of a copartnership:

> "Story defines a copartnership to be a 'voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of profits between them.' "

Therefore, the Hawaiian law on this subject is no different from that in most jurisdictions.

There is no question tht the parties intended a partnership at some time because as above stated the trial Court held that the agreement "was one to form a *partnership.*" (Tr. p. 48.) Therefore, the sole question is whether facts presented a bare agreement to form a partnership or an existing partnership. For better presentation the argument to follow is divided into sections.

A. PARTNERSHIP WAS "LAUNCHED" BY ACTUAL OPERATION OF BUSINESS.

It is respectfully submitted that as of October 1, 1941 the partnership business was launched and the prior agreement to form a partnership matured into an actual partnership.

Assuming for the present, though not admitting, that the original oral agreement was an executory contract to form a partnership in the future, namely, at such time when the Appellant paid the $3,000, it is our contention that the partnership was formed

regardless of the fact that such condition precedent to the formation was not performed by the Appellant.

A condition precedent to the formation of a partnership may be waived by the interested parties, and after the waiver thereof a partnership may be formed in spite of the nonperformance or the nonhappening of the condition. The effect of such waiver would for all practical purposes cause the agreement to read as though the condition precedent was never in the contract. Walter A. Shumaker in his "Treatise on the Law of Partnership," states in Section 24 at page 78:

> "Any act, the performance of which is made a condition precedent to the formation of the partnership, must be performed before a partnership will be held to exist, though of course it is competent for the parties themselves to waive a condition precedent; and *such conditions are waived where the parties actually 'launched' the partnership without waiting for performance.*" (Emphasis ours.)

In 40 *Am. Jur.* 142-143, paragraph 27, it is stated:

> "There is a marked distinction between a partnership actually consummated and an agreement to enter into partnership at a future time. * * * On the other hand, it has been held that a partnership relation exists although the conditions of the partnership are not understood alike by all the partners, *when the parties have agreed to become partners and have actually proceeded to carry into execution the joint undertaking or business.*" (Emphasis ours.)

In *First National Bank of Gainsville v. Cody et al.,* 19 S.E. 831, 93 Ga. 127, the parties entered into an

executory contract to form a partnership in the future "when the stock of Palmour & Smith and of Jepths M. Cody is put together, and inventory is fully taken which shall be within the next 20 or 30 days," the Court held, at page 838, that a partnership was created prior to the happening of the condition precedent:

> "As originally contemplated in the contract for a partnership between Palmour and the two Codys, the partnership business was not to begin until two certain stocks of goods had been consolidated, and an inventory of the same taken. The Court charged in effect, that no partnership could exist between these parties until this has been done. There being evidence to sustain the contention of the defendants that, in point of fact, the partnership did commence in advance of the time stipulated in the contract, this charge was erroneous. *It was undoubtedly competent for these parties to begin the transaction of a partnership business before the time at which they intended it should begin when the contract was made.*" (Emphasis ours.)

The evidence showed that there was a misunderstanding of the terms of the agreement entered into by the Appellant and the Appellees. It was not definitely settled by the Appellees and the Appellant just exactly when the money was to be paid by the Appellant. In exactly such a case where there was a misunderstanding by the parties to the agreement as to the terms of the agreement for the formation of a partnership the Vermont Court in *Cook v. Carpenter and Cook,* 34 Vt. 120, stated:

"* * * but, by the default of the defendant Cook, they did not understand the terms of the joint agreement alike. The plaintiff understood that the capital was to be raised wholly by the defendants, while the defendant Carpenter understood it was to be raised in the ordinary way, by all the members of the firm. *It has never been held that when persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business, that the relation of partners does not exist, because the conditions of the partnership are not understood alike by the partners.*" (Emphasis ours.)

In *Cogswell v. Wilson,* 11 Or. 371, 4 Pac. 1130, the Court in a similar situation as in the present case stated:

"The defendant, Wilson admits the execution of this contract, but denied that its terms or conditions have ever been performed, or that any copartnership was ever formed or established in pursuance of its provisions, and claims that owing to the inability and failure of the said Jones to comply with his part of the agreement, it was mutually abrogated and abandoned by them, that another and different arrangement was made, and a contract entered into between them, in which it was expressly stipulated in writing that when Jones paid him a certain sum—the purchase price of the sheep—then only was he to deliver to Jones one half of his band of sheep and their increase. * * *"

"*If the contract has been made, property and labor contributed, and the partnership business commenced, there is a partnership until legally dissolved.*" (Emphasis ours.)

In *Hartman v. Woehr and Stegmuller,* 18 N.J. 383, the Court stated:

"They deny that he is, or ever was, a partner, on the ground that he has never complied with the partnership agreement, by paying up his share of the capital. The position taken on their part is, that until that is paid up, he is not admitted as a partner. But this agreement was for a partnership to commence immediately, and to continue for five years. The partners each agreed to pay in $10,000 of the capital, but it was not a condition precedent. The complainant by his deed, paid up at the time of the agreement $5,667 of his share; and the defendants accepted it, and used and continue to use, the property in the partnership business. *Neither of them paid up his share at that time, but at intervals of weeks or months afterwards. But the business of the partnership—the erecting of the brewery, and manufacture of beer went on; each contributed some capital and labor. The existence of a partnership does not depend upon the fact that each partner, has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced or carried on to any extent, there is a partnership.* In this case, Hartman put in his property, which was taken, and is still used for the business of the firm; he and his property are liable to all debts of the firm, not only to the notes given in his name, but to all debts incurred, both before and since the 31st day of January, 1866; and if the firm is unfortunate and fails, he may be stripped of every dollar he is worth. The defendant had a remedy if he did not comply with his engagement; they could have asked for a dissolution, and paid him back the amount he

put in, and formed a new partnership. But under this agreement, he was a partner for five years, unless the partnership was sooner dissolved." (Emphasis ours.)

Furthermore, it is submitted that the trial Court found that the original agreement was as follows:

"From the middle of September until about October 20th, 1941, the Green Mill was operated by Ching (Appellant) and Chong Hing, (Appellee). Up to October 1st it was a trial period under the supervision of the Lums and *after that for the new purchasers.*" (Tr. p. 46.) (Emphasis and identifying insertions ours.)

On October 1, Appellant was one of the purchasers because the trial Court found:

"After some discussion Lum agreed to sell for $25000 plus inventory and the Tenn brothers (Appellees) and Ching (Appellant) agreed to buy the Green Mill." (Tr. p. 44.) (Identifying insertions ours.)

Since there was no bill of sale as of October 1, 1941, the Appellees were purchasers on said date by virtue of the contract to purchase. Under the contract to purchase the Appellant was just as much a purchaser as the Appellees.

The trial Court further stated:

"It was agreed between the parties that *upon the formation* of the partnership that the active members would be Ching, who would be in charge of the personnel and management of the business, and Chong Hing Tong who would take care of the finances and any legal matters." * * * (Tr. p. 45.) (Emphasis ours.)

If the agreed terms were as the trial Court found, then by Appellant's taking charge of the personnel and management (Tr. pp. 294-295) the partnership was in existence. Fact findings of the trial Court in this case must be carefully studied because it was a very close case. The trial Court rendered two decisions. See Tr. pp. 43-48 for the written decision and Tr. pp. 393-399 for the oral decision.

Based on the foregoing authorities it is submitted that "Launching" the business put the partnership into operation and existence and furthermore the trial Court's own findings put the partnership into operation.

B. BUSINESS OPERATED ON EQUITABLE TITLE AS OF OCTOBER 1, 1941 AND EVEN AFTER OCTOBER 20, 1941.

This argument is submitted to show that the entire business since its inception on October 1, 1941, and even after October 20, 1941, the date of the Bill of Sale (Tr. p. 161) was based on equitable title and so when an equitable title was obtained on or about September 15, 1941, all of the necessary co-ownership attributes to an existing partnership existed as of September 15, 1941. Both the trial Court and the Supreme Court laid emphasis on the date of the Bill of Sale, October 20, 1941, but as far as co-ownership was concerned even after October 20, 1941, the type of title held by the Appellees was the same as that of September 15, 1941.

The trial Court in its written decision found as follows:

> "After some discussion Lum *agreed* to sell for $25000 plus the inventory and the Tenn brothers

(Appellees) and Ching (Appellant) agreed to buy the Green Mill." (Tr. p. 44.) (Identifying insertions and emphasis ours.)

The inventory value later turned out to be $10,-046.25 (Tr. p. 224) so the total purchase price was $35,046.25. In other words the Appellant assumed a $35,046.25 liability together with the Appellees. The trial Court's finding necessarily leads to this conclusion. Such liability may have been enforceable against the Appellant only because it was joint and several. There was a leasehold involved and under Hawaiian law the purchasers may enforce such agreement by way of a suit in specific performance.

Yee Hop v. Young Sak Cho, 25 Haw. 494;
Tong On v. Tai Kee, 11 Haw. 560;
Sakata v. Yoshikawa, 22 Haw. 288.

Therefore upon the trial Court's own findings the Appellant had an equitable right and property in and to the Green Mill as of about September 15, 1941. When the business was operated by the purchasers as of October 1, 1941, the Appellant was a co-owner because up to the date the Bill of Sale was consummated, the Appellees' possession was only by virtue of the Contract of Sale. Had it not been for the Contract of Sale the Appellees would not have been in possession on October 1, 1941. In other words the partial equitable ownership of the Appellant made the business possible as of October 1, 1941.

Even after October 20, 1941, the date of the Bill of Sale (Tr. p. 161), the Appellees only had an equitable title because there was a simultaneous chattel mortgage. (Tr. p. 224.) The Appellees' entire busi-

ness even after the alleged purchase on October 20, 1941 was based on an equitable title so the Appellant's above-mentioned claim of partial equitable title cannot be belittled.

Much was said by the trial Court that Appellant did not pay his $3,000.00 but when the Appellees themselves got the Bill of Sale, they were $10,046.25 short. In other words each of the Appellees was at default in the sum of $3,348.75 in accordance with the original agreement between Appellant and Appellees because the trial Court found as follows:

> "A conference was held one evening at the home of the father of the Tenn brothers * * *
>
> At this time it was agreed that Ching's share would be $3000.00 and the *balance would be paid by the Tenn brothers.*" (Tr. pp. 44-45.) (Emphasis ours.)

The Appellees themselves were not able to raise the balance but prevailed upon Lum to accept the chattel mortgage of $10,046.25. (Tr. p. 224.)

In other words the co-ownership of the Appellees as of October 20, 1941, the date of the Bill of Sale, was based on a *credit transaction*. Appellant's claim of co-ownership as of September 16, 1941 was admittedly a credit transaction, but Appellees are not in a position to argue that Appellant's interest was by way of credit only because even Appellees' own title as of October 20, 1941 was based on credit.

At this point all of the points regarding fiduciary relationships in argument (I) are repeated to establish that Appellees took equitable title on October 20,

1941 as trustee for the Appellant. Argument (I) definitely establishes co-ownership in the Appellant by way of a constructive trust.

Furthermore a purchaseer who takes title with knowledge of an outstanding agreement of purchase takes title as trustee for the first purchaser. It is stated in 49 *Am. Jur.* 171, paragraph 148, as follows:

> "Conflicting Purchasers. It is well settled that one who takes a deed of land with knowledge of an outstanding contract or title takes it subject to such contract or title, and the person who purchases property with notice of a prior agreement by the vendor to convey to another person is *regarded as the trustee of the latter.* Therefore, one purchasing property with notice that the grantor has contracted to convey it to another may be compelled to perform the contract in the same manner and to the same extent as his grantor would have been liable to do had he not transferred the legal title." (Emphasis ours.)

Therefore it is submitted that if the Appellees by obtaining their equitable title on October 20, 1941 by way of the Bill of Sale initiated their partnership, there is no reason why Appellant's equitable title as of September 15, 1941 was not just as good to initiate the partnership.

C. APPELLANT RENDERED SERVICES AND ACQUIRED INTEREST IN PARTNERSHIP ASSETS.

The fact that Appellant rendered services is not disputed by the Appellees.

The trial Court found that from the "middle of September until about October 20, 1941, the Green

Mill was operated by Ching (Appellant) and Chong Hing". (Tr. p. 46.) One of the factors in determining whether a partnership existed is the contribution of labor or services. Appellant's services were not only promised but it was actually performed. It is not denied by any of the Appellees that Appellant has never been paid for his services. (Tr. p. 306.)

It is submitted that Appellant's rendering of services created an interest in the partnership assets as of October 1, 1941. In 48 *C.J.S.* 836 it is stated:

> "Effect of performance. The performance of services by a joint adventurer in accordance with his agreement with associate or associates gives him, not only a vested interest in the profits derived from the successful prosecution of the enterprise * * * but also in the real and personal property embarked therein, as effectually as though he had contributed a part of the capital with which it was purchased * * *". (48 *C.J.S.* 836.)

Such an interest cannot be summarily forfeited. It is stated in 33 *C.J.* 854 as follows:

> "After the agreement has been partially executed by the member's payment of a part of the capital *or the performance of services,* his associates cannot forfeit his interest in the enterprise and exclude him from further participation therein merely because of his failure to pay the full amount promised by him, especially *when no demand has been made upon him for contribution and he has not refused to pay his share;* but his interest is held subject to the claim of his associates for any losses which his default may have caused them." (Emphasis ours.)

Therefore the Appellant's rendering of services is a material consideration in deciding whether the agreement was barely executory or an existing partnership.

D. LETTERS OF OCTOBER 6, 1941 BY DR. FOOK HING TONG ADMITS AN EXISTING PARTNERSHIP.

The letter of October 6, 1941 to the Appellant by the Appellee is an admission that the partnership was in operation. The said letter was introduced as petitioner's Exhibit "A". (Tr. pp. 130-132.) He stated in the letter:

"PETITIONER'S EXHIBIT A

Wailuku, Maui, 10/6/41

Hello HC

Received your letter this noon and was glad to hear from you but I am very sorry to hear that my brothers are giving you a hell of a lot of trouble on this damn business. Don't be sueprised that I expected that and was very reluctant to let things go as it is. Any way I guess since *I am the heaviest stock holder* and I know that you were instrumental *in getting the business* for us I feel that it would be okeh as long as you were able to take the business and manage it. I know that I wouldnt put 15000 dollars for nothing knowing that it is a gold mine but hell if *you ditch* the place there wont be any of that money that I will ever smell. I know those brothers of mine and that is one reason why I didn't back them up the last time when they wanted the Motorcoach cafe. Now the trouble id up again.

Here is the proposition, as was stated verbally that you handles the personell and that you also

take care of *my interest there. I have 15 shares and you have three,* that is if you get the dong by then, Really I am damn sorry this thing came up as I am just tied down here. I *wouldn't buy the place* if you did not have the job of managing the place. Okeh now you tell my brother that you are representing me and if he doesn't like it he can return the 14000 and *I will pull out and if not I will try and buy him out.* So hold the contract and let Hiram Fong know that I want my share in that business and not to put his name in the whole shee bang, I am sorry to hear from of that crap about my brothers but didn't know that it was that bad.

So much HC as I am very busy and am going to write to those fellows a letter and *tell them that I intended for you to handle the business* as I have all the confidence ib you and *that I would not have* put the money out if I was to learned that you were not there to handle it. I know for a fact that they do not thoroly know the hoomalimali game, the banana oil stuff. So much. Tell Dee Hing to take his face out of the place or throw him out as he has nothing in there. As for Kui Hing he is a week sister and I am disappointed in that guy. So you see you are he big cheese there. Please check the cash too with them and keep track of the whole affair: I hereby appoint you to take *charge of my interests there.*

I am going to write him now and tell him to learn the bloody business before he starts to think of something else, or let me have my 15000 thousand back. Better put it in Black and white and tell Long John to hold out consumating the business. Ahola Bear.

(In pencil): Copy of letter that I wrote Chong * * * They got excited when they see plenty of people and dough. Small town guys Ching * * * so be tolerant and patient. Do it for my sake.

/s/ B'' (Emphasis ours.)

The emphasized portions show that Dr. Tong already on October 6, 1941 considered himself as having an interest in the business although his status was the same as the Appellant's. Appellant and Appellees all had an agreement to purchase as of October 6, 1941. He dealt with the agreement to purchase as having created a vested interest. His statement that "I *have* 15 shares and you *have* three" is especially significant because the word "have" is used. The entire tone of the letter unmistakably designates a present (as of October 6, 1941) interest in the business. *In other words Appellant did have 3 shares on October 6, 1941.*

Furthermore the entire tone of the letter is one of telling another how to run a business. If there were no existing partnership on October 6, 1941, where did Dr. Tong get his authority to tell the others as to how the business should be run? Persons who are mere members of an executory contract to form a partnership do not order people as to how business should be run. *He knew that he had a vested interest and there was a going partnership business*—otherwise the entire letter would not have been written. Only a partner in an existing partnership can write a letter as that written by Dr. Tong.

The letter marked Exhibit A-1 (Tr. pp. 133-135) is of the same purport. He distinctly tells his brother

what to do and how to run the business. Here again, he wrote it as an active partner—because one who is a bare member of an executory contract to enter a business would not write such a letter.

E. ALL OTHER ELEMENTS OF PARTNERSHIP EXISTED.

Sharing of Profits—The evidence is undisputed that the parties intended to share profits. The trial Court found "Each was to draw a salary of $250.00 a month *in addition to their share in the business*". (Tr. p. 45.) (Emphasis ours.) The later agreement of partnership entered into by the Appellees only clearly shows that a division of profits was originally intended. See Respondents' Ex. 1. (Tr. p. 147.)

Sharing of Loss—The later agreement of partnership clearly provides for this. (Tr. p. 147.) The parties must have intended this from the beginning.

Control—Appellant himself was allowed to take charge of the personnel and management of the partnership. He did this from about September 15, 1941 to about October 20, 1941. See trial Court's findings. (Tr. p. 45.)

Community of Interest in Property—The original agreement of purchase entered into on or about September 15th, 1941, which the trial Court found to be an agreement was sufficient to create this. (Tr. p. 44.) See Argument (I).

Capital Contribution—It is stated in 40 *Am. Jur.* 163, paragraph 49:

> "The fact that the party rendering services assumes financial or money obligations by agreeing to make capital contribution or to pay ex-

penses, or by furnishing credit, is suggestive of a partnership contract * * * Again these tests are by no means conclusive."

See Annotation in 137 A.L.R. 47. The trial Court found that Appellant agreed to furnish $3000.00. In addition Appellant assumed a $35,046.25 obligation. (Tr. p. 44.)

F. SUPREME COURT OF HAWAII HAS DECIDED THAT IN A SIMILAR SITUATION PARTNERSHIP EXISTED.

The case of *Lathrop v. Wood,* 1 Haw. 121, (also cited as 1 Haw. 71, old edition) decided by the Supreme Court of Hawaii in 1852, though one of the earliest cases in Hawaiian Jurisprudence, is much in point in this present case. The question was whether a certain written agreement constituted a partnership. The following was the agreement:

" 'This agreement, made the first day of October, one thousand eight hundred and fifty, between Robert W. Wood, resident of Honolulu of the first part, and A. H. Spencer, now resident of Honolulu, of the second part, witnesseth, that for certain considerations hereinafter mentioned, the party of the first part engages to convey to the party of the second part, on or before the first day of October, 1851, one-half of his interest in a certain leasehold estate situated on East Maui, * * * also one-half of my rights and interests in a tract of land makai of the tract above described amounting to two hundred acres, * * * Also one-half of my interest in a certain other tract of land situated in East Maui under a verbal contract for a warranty deed with Richard Armstrong, in consideration of which contract the

party of the first part has paid to the said Armstrong one thousand dollars. Also one-half my interest in all the personal property, situated in East Maui, consisting of working oxen, cattle, carts and building materials, * * * subject also to a balance of about two thousand dollars which may be found to be due R. Armstrong on account of land purchased by him. And in consideration of the above properties engaged to be conveyed, the party of the second part agrees to pay or cause to be paid to the party of the first part three thousand nine hundred and sixty-two dollars and fifty cents, as follows: Two thousand dollars in thirty days from the date of this instrument * * * one thousand dollars on the first day of January next, * * * and the balance, nine hundred and sixty-two dollars and fifty cents on the first of October, 1851, * * * And the party of the second part further engages to take charge of the above mentioned estate and properties and * * * for the full term of three years from the date of this, and it is further agreed between the parties that in consideration of the above named services, the said A. H. Spencer shall be allowed a suitable house for himself and family * * * allowed a salary of two thousand dollars a year, and the said A. H. Spencer engages that during the above mentioned time he will engage in no other business, trade or speculation, whether pertaining or not to the duties of superintendent on his private account, but shall devote his whole time to the joint interests of both parties, and it is further agreed between the parties that the liabilities upon the above property, viz., two thousand dollars due R. C. Wyllie on his mortgage, also two

thousand dollars or thereabouts, due R. Armstrong, also the rent and current expenses incurred since the first of April last, shall be borne equally by both parties. And it is further agreed that one-half of all the advances made from this date for the erection of buildings, sugar-mills, and all current expenses including salary of the superintendent, and all losses shall be borne equally by both parties, also all profits arising from the business to be divided equally.

And the party of the first part engages to furnish so much capital as may be necessary to erect and put in operation a sugar-mill, and make such other improvements as the interests of the place may require under a judicious and economical administration by the party of the second part, and such amounts as may become due said Wyllie and Armstrong, on account of a mortgage, and land purchased of said Armstrong. And the party of the second part agrees to apply all his interest in the net proceeds of such amounts as may be due from him to the party of the first part on account of the plantation. And it is further agreed that an account current between the parties shall be made out on the first of October, 1851, and that any balance that may then be found to be due to the said party of the first part, shall be secured to him by a mortgage on the interest which said A. H. Spencer may have in the estate which is to be conveyed as above set forth.

R. W. Wood,
A. H. Spencer.' ''

The Court held with relation to this agreement that from the date of the signing of the agreement Spencer became a partner in the enterprise. The Court stated, at pages 125-127, as follows:

> "The first question is, what is the nature of this agreement. Is it a contract of copartnership between the parties, or is it as the complainant contends, a mere executory contract for the conveyance of one-half of the East Maui plantation on the payment of the three notes? In the construction of all agreements, the only proper rule is to seek for the intention of the parties. However inartificial or untechnical the manner in which the instrument is drawn up, equity will give effect to the real intentions of the parties, as gathered from the objects of the instrument and the circumstances of the case. I have read this instrument with much care, and, in my opinion, it was the evident intention of the parties to create a partnership, and I cannot see how the instrument can bear any other fair interpretation. The parties to it were to become joint and equal owners of the capital stock of the business, the lands, oxen, cattle, carts, building materials and other personal property. Spencer was to take charge of the plantation and superintend the erection of the mills, buildings, and other works necessary for the prosecution of the business and to 'devote his whole time to the joint interests of both parties'. In other words, Spencer was to be the working partner, and for his exclusive devotion to the joint interests of the concern, he was to have a suitable house for himself and family, certain rights of pasturage and a salary of two thousand dollars. The liabilities upon the prop-

erty, namely, the mortgage of Mr. Wyllie, the debt of Mr. Armstrong, the rents due, and the current expenses from the 1st day of April, 1850, were to be borne equally by both parties. 'And it is further agreed that one-half of all the advances made from this date for the erection of buildings, sugar mills, and all current expenses, including salary of the superintendent, and all losses shall be borne equally by both parties, also all the profits arising from the business to be divided equally.' A mutual participation of profits and losses in any business has always been considered as creating a partnership, and there is such a plain communion of interest and mutuality of losses and profits in this case, as to my mind creates a partnership beyond a doubt. If the construction contended for by the learned counsel for the complainant be true, namely, that Spencer is a mere agent of Wood for carrying on the plantation, receiving a stipulated sum for his services, and having none of the rights and powers of a partner over the plantation and its business, why, I would ask, is Spencer to own one-half of the capital stock? Why is he to devote his whole time to the joint interests of both parties? Why pay half the advances and expenses? Why pay half of his own salary as superintendent, or share equally in the losses or profits of the business? *To my mind it is clear that from the signing of the agreement on the first day of October, 1850, Spencer became clothed with all the rights and liabilities of a partner in the East Maui plantation, and had as great a voice and control over its operations and business as the defendant Wood. To call Spencer a mere agent or servant of the*

East Maui plantation while he has a community of interest in all its property, and is to share equally in all its losses and profits, would be doing violence to every principle of the law of partnership. But it is said that the word partnership does not once occur in all the agreement. Very well, such word need not so occur to create a partnership, if the intention of the parties is plain as in this case." (Emphasis ours.)

It is submitted that the case is similar to the present case in that as of the date of entering into the written agreement, the party, Spencer, entered into an agreement to purchase. The Appellant in this case as of September 15, 1941 also entered into an agreement of purchase. Most of the other attributes for a partnership which were present in that case were similarly present in the present case.

It is submitted that if the above quoted agreement created a partnership as of the day the agreement was signed, then the Appellees and the Appellant also entered into a partnership as of September 15, 1941, the day when the conference was held at the home of the Tenn brothers after returning from the Lum home. (Tr. p. 109.)

It is therefore submitted that all of the necessary elements to have a present partnership existed on September 15, 1941 or at least by October 1, 1941 under the reasons submitted in subparagraphs A, B, C, D, E, and F, and the trial Court erred in not finding an existing partnership relationship as of the

dates indicated. The Supreme Court's refusal to reverse the trial Court's refusal to find an existing partnership was error.

III.

THAT THE SUPREME COURT OF HAWAII ERRED IN COMPLETELY DISREGARDING THE ORAL INTERLOCUTORY DECISION AND THE FACT FINDINGS THEREIN OF THE TRIAL COURT.

The trial Court on July 2, 1948 rendered an interlocutory oral decision and made material fact findings therein. (Tr. pp. 393-399.) The Appellee attempted to seek an interlocutory appeal therefrom. (Tr. pp. 398-399.) The accounting had not been even started so there is no question that the oral decision was interlocutory.

At the end of the aforesaid oral interlocutory decision the Court stated: "the Court * * * will order an accounting." (Tr. p. 398.) The said order was made on July 2, 1948. No written order was entered but on July 24, 1948, twenty-two days later, the following minute order was entered:

> "The Court this date *set aside its order for an accounting* on July 2, 1948, and will take the case under advisement." (Tr. p. 43.) (Emphasis ours.)

It is important to note that only the order for accounting was vacated, the trial Judge did not at any time expressly vacate its oral interlocutory decision and the fact findings therein. It has been held that an

order is distinct from the findings. In *Brady v. Interstate Commerce Commission,* 43 F. (2d) 847, at page 850, it is stated:

> "An 'order' is a 'mandate, precept; a command or direction authoritatively given; a rule or regulation' Black's Law Dictionary; 46 C. J. 1131; 42 C.J. 464. An order of the commission is analogous to the judgment of a court; and it is well settled that the findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument. 15 R.C.L. 570; Judge v. Powers, 156 Iowa 251, 136 N.E. 315, Ann. Cas. 1915 B., 280. As said by Judge Learned Hand in Eckerson v. Tanney (D.C.) 235 F. 415, 418 'The judgment itself does not reside in its recitals, but in the mandatory portions'. It has been expressly held that findings of the commission embodied in its reports are not orders within the meaning of the statutes relating thereto. Am. Sugar Refining Co. v. D. L. & W. R. Co. (CCA 3) 207 F. 733, C. B. & O. R. Co. v. Merrian (CCA 8) 297 F. 1, 3-5."

See also *G. Amsinck & Co. v. Springfield Grocer Co.* (C.C.A. 8), 7 F. (2d) 855; *Carolina Aluminum Co. v. Fed. Power Commission* (C.C.A. 4th) 97 F. (2d) 435.

Therefore it is respectfully submitted that the oral interlocutory decision was never expressly set aside and fact findings therein were therefore never expressly set aside.

The trial Court on the 25th day of August, 1948 rendered a written decision (Tr. pp. 43-48). By its

very nature and conclusions reached it was a final decision. The gist of the written decision of the trial Court was that Appellant did not tender his $3000. (Tr. pp. 43-48.) "Equity helps the vigilant, not those who sleep on their rights." (Tr. p. 48.) The trial Court's written decision is not inconsistent with oral interlocutory decision in that in the written decision an additional defense of lack of tender was considered.

There is no statute under the Hawaiian laws requiring that equity decisions be written. Therefore the fact that one was written and the other oral should not make any difference. See *McKenny v. Wood* (Me.) 80 Atl. 836 where the state laws did not require a written decision, an unsigned written decision was held sufficient.

Therefore it is submitted that the following fact findings in the trial Court's oral interlocutory decision (Tr. pp. 393-399) must be given full consideration:

> "From the inception of the operation of the Green Mill by the brothers, of which Chong Hing was the active (262) participant, taken from the testimony and the circumstances, and what eventually ended up, it appears to this Court that Chong Hing was not particularly interested in, and was possibly opposed to, having Ching become a partner in this business * * *
>
> It is apparent that when they come right down to drafting the partnership papers themselves there was a desire to leave Ching out of the picture.
>
> Dr. Tong testifies that he felt that Ching, instead of looking after his interest, and doing what

was right, had double-crossed him. What that double-cross was is pretty clear, and taking all the circumstances into consideration this Court arrives at this conclusion with reference to this partnership: It appears that Chong did not want Ching in; he particularly and he finally prevailed upon his brother, Dr. Tong to leave him out. And immediately (263) when Ching heard about this, up at Hiram Fong's office, he telephoned Dr. Tong on Maui, and immediately went over to see him and borrowed money from somebody—borrowed $75 from somebody, and went to Maui to see about it. In other words, it would appear from his action that he was greatly surprised and chagrined that he was not within the partnership.

Well, this Court believes that at the time that this partnership was actually consummated it really amounted to a squeeze-out of Ching, * * *" (Tr. pp. 394-396.)

Said findings were not specifically set aside and there is nothing in the written decision inconsistent with said findings.

In 3 *Am. Jur.* 457, it is stated:

"Findings of fact made by the trial court in ruling upon motions or in making rulings in the course of a trial are regarded on appeal in much the same manner as findings of fact upon which final judgment is rendered. Thus, a finding by the trial judge denying a motion to set aside a verdict, or for a new trial, for misconduct of the jury, upon the ground that a juror was not impartial, or upon the question of the credibility as a witness of a child upon whose testimony a con-

viction rests, will not be reviewed where there is evidence to sustain the finding made. Nor will the decision of the court below that a witness is competent to testify as an expert be reviewed on appeal if there is any evidence to support it * * *"'

See *Crawley v. State,* 151 Ga. 818, 108 S.E. 238; *Jacobs v. Danciger,* 328 Mo. 458, 41 S.W. (2d) 389; *Cook v. Highland Hospital,* 168 N.C. 250, 84 S.E. 352. The interlocutory oral decision was made in the course of the trial in the trial Court. It is submitted that the said findings in the oral decision should be treated in the same manner as other findings of fact made in the written decision upon which the final decree was entered.

IV.

THE SUPREME COURT OF HAWAII ERRED IN HOLDING THAT A TENDER WAS NECESSARY.

On the question of tender the trial Court held as follows:

"'* * * The letter to Ching reaffirmed the oral arrangement between the Tenn Brothers and Ching to be partners in the business, and advised Ching that he was to have three shares 'That is if you get the dong by then'. It also asked Ching to take care of Dr. Tong's interest in the business.

By the uncontroverted testimony the petitioner never tendered the amount of this subscription ($3,000.00) to any of the present respondents. He asserts his failure is: no demand was made on him to put up his $3,000.00 by (39) Chong Hing Tenn who was to take care of the finances. Peti-

tioner admittedly did not get along too well with Chong Hing Tenn and complained to Dr. Tong and was advised that he *would be* in the partnership 'that is if you get the dong (money) by then'. With this warning he made no tender of his share. Then upon learning he was not included in the partnership he borrowed $75.00 and went to Maui and, according to Dr. Tong, again asked him (the Doctor) to finance him. *Petitioner's story of lack of demand coupled with a promise of a unsecured loan from a competitor to pay his share seems rather weak as against a direct demand and warning by Dr. Tong to get the money, and never discussing the matter of putting up his $3,000.00 when he knew at the time that the necessary transfer were being made by Attorney Fong* * * *

On October 1, 1941, petitioner unquestionably had a right upon putting up $3,000.00 to get a share in the business. Means were then available to him to learn and be aware of what was going on relative to the proposed (40) partnership. He could have checked on the transfer of the liquor license, the assignment of the lease through either Fong or Lum and the Gross Income License at the Tax Office and acted accordingly. But he did nothing. Equity helps the vigilant, not those who sleep on their rights." (Tr. pp. 46-48.) (Emphasis ours.)

The Supreme Court of Hawaii in its opinion affirmed the foregoing findings of the trial Court. In addition to affirming of said findings the Supreme Court made the following additional findings:

"* * * Under the oral agreement with the seller *fixing the time of payment of the purchase price as October 1, 1941, a limitation of time for performance by the petitioner, during which he was to tender his contributive share, was fixed and agreed upon.* Of this limitation and due date the petitioner, as a party to the very agreement, *possessed positive and unequivocal knowledge and notice.* In addition to the fact that the experimental period of operation by the party purchasers was to terminate on October 1, 1941, during which period the petitioner had ample opportunity to tender his contributive share, the evidence further discloses that the sale, by way of execution of all requisite documents and transfers, was not consummated until October 20, 1941, retroactive to October 1, 1941. The petitioner was by operation of time and with the acquiescence of the respondents, gratuitously accorded an extra period of dispensation in which to tender his contributive share. During this twenty-day period of additional concession, the petitioner failed to perform, and has not, in our opinion and as found by the trial judge, established any valid reason for his default. The letter of October 6, 1941, from Fook Hing Tong to the petitioner, fourteen days prior to the actual consummation of the sale, contains an affirmance that the original agreement between all party purchasers, including the petitioner, was still in effect, though the trial period and the due date of the purchase price on October 1, 1941, expired six days prior thereto. The period within which the petitioner could have tendered his contributive share was thereby extended to October 20, 1941. Of this extension of time in which to perform, the peti-

tioner was also given notice * * *" (Tr. pp. 64-65.)

It is interesting that both the trial Court and the Supreme Court of Hawaii based their findings of demand on the following sentence from the letter of October 6, 1941 from Doctor Tong to the Appellant:

> "I have 15 shares and you have 3, that is if you get the dong by then." (Tr. p. 131.) (Pet. Ex. "A".)

The trial Court not only changed the "have" to "to have" (Tr. p. 46) and later to "would be" (Tr. p. 47) but interpreted the "dong" clause to be a "direct demand and warning" by Dr. Tong. (Tr. p. 47.) The findings of the trial Court having been made on a document, it is submitted that this Court is in just as good a position as the trial Court to consider the evidence. In *Kind v. Clark* (C.C.A. 2) 161 F. (2d) 36, the Court held:

> "In so concluding we rely on the documentary evidence which we are in as good a position as the trial judge to determine."

The usual rule that fact findings will not be disturbed by an appellate Court unless there is an obvious mistake, *Chas. V. Lilly Co. v. I. F. Laucks* (C.C.A. 9) 68 F. (2d) 175 is not applicable in cases where fact findings are made on documentary evidence or depositions. *Africa Maru* (C.C.A. 12) 54 F. (2d) 265, *Midland Flour Milling Co. v. Babbitt* (C.C.A. 8) 70 F. (2d) 416; *Letcher County, Ky. v. De Foe,* 151 F. (2d) 987; *Sun Ins. Office of London v. Be-Mac Transport*

Co., 132 F. (2d) 535; *Johnson v. Griffiths S. S. Co.,* 150 F. (2d) 224, and *Bowles v. Beatrice Creamery Co.*, 146 F. (2d) 774. Only "slight" weight is given to the trial Court's findings in such case. *Eq. Life Ass. Soc. v. Irelan* (C.C.A. 9) 123 F. (2d) 462.

It is submitted that the word "then" meant *when Appellee, Chong Hing Tenn, made demand* because the trial Court found:

> "It was agreed between the parties that upon the formation of the partnership that the active members would be Ching, who would be in charge of the personnel and management of the business, and Chong Hing Tenn who *would take care of the finances and any legal matters.*" (Tr. p. 45.)

The evidence in support of this finding was undisputed. When the letter of October 6, 1941 was written Dr. Tong was not in Honolulu, but it was written from Wailuku, Maui, (Tr. p. 130) an Island other than that on which Honolulu is situated. The admitted evidence is that both Appellant and Chong Hing Tenn worked together at the Green Mill from about September 15, 1941 to October 20, 1941. (Tr. p. 169.) Since Chong Hing Tenn was in charge of finances, Appellant had the right to rely on him. When Dr. Tong wrote the letter he too knew that Chong Hing Tenn was in charge of finances. (Tr. p. 119.)

Dr. Tong testified:

> "Q. It was understood it was left—all these financial matters—in your brother's hands, Chong Hing, isn't that right?

A. Yes, some time speak to an attorney to take care of.

Q. That was before you left? (Referring to leaving for Maui.)

A. Before I left." (Tr. p. 119.)

Certainly by no inference could it be said that the money was to be sent to Dr. Tong on Maui. The only reasonable construction is that it was to be paid to Chong Hing Tenn, the person in charge of finances and who worked side by side with Appellant. *It is submitted that "then" meant that it was to be paid when Chong Hing Tenn demanded the money.* Any other construction would be unreasonable and arbitrary.

The reason why Chong Hing Tenn did not make demand was as he testified:

"Q. Where did Mr. Ching come into the picture, if he came at all?

A. *I don't know about him. I didn't do business with him.*

Q. Did your brother Fook Hing?

A. Maybe he did; not with me." (Tr. p. 156.)

Whether that was the true reason or whether Chong Hing Tenn wanted the entire business for himself —*No demand was made by Chong Hing Tenn.* In fact on October 6, 1941 the same day as the date of the "dong" letter of Dr. Fong, Hiram Fong, the attorney for the Appellees, wrote to the Liquor Commission asking for a transfer of the license to Chong Hing Tenn only. (Tr. pp. 202-203.) In other words on the same day Dr. Tong wrote Appellant that you *have* 3

shares, Appellee, Chong Hing Tenn, was undertaking to double-cross his own brothers and Appellant.

All of argument "I." is repeated here because the fiduciary relationship required Chong Hing Tenn who took care of finances to keep Appellant fully informed. He not only refused information as argued in argument "I." but did not make demand so that he or his family may keep the business for themselves.

There is no finding that the Appellant was unable to raise his $3,000.00. The trial Court merely held:

> "He *asserts* that he made arrangements with one K. C. Wong, the owner and operator of the Riverside Grill (a restaurant and bar) to loan him, when needed, the sum of $2,000.00 without any security and the balance was to be raised by putting an additional mortgage on his house." (Emphasis ours.)

This is not a fact finding that Appellant was not able to get the money. The uncontradicted testimony of Mr. K. C. Wong was:

> "A. I asked Mr. Ching, and he said about $3,000. 'Why didn't you put in $5,000?'
>
> Q. Who said that?
>
> A. I said that. He said that he hasn't got enough money. So he asked me for a loan. I said, 'I can help you.'
>
> Q. Mr. Ching asked you to help him a little bit?
>
> A. Yes.
>
> Q. Were you ready to help him?
>
> A. Yes.
>
> Q. Did you tell him that?
>
> Yes." (Tr. p. 191.)

"Q. What do you mean?

A. About $2,000 I promise him, if he mortgage his house he can get $3,000.

Q. When was this, Mr. Wong, was this before you had the conference with Ching and Tong?

A. Yes. Before that he buy the place.

Q. Did you see Ching before he and Doctor Tong came up to your place of business to discuss this question of whether this was a good buy?

A. Yes.

Q. Was it on that occasion that you told him that you could give him about $2,000?

A. Yes.

Q. Did he ever come back after that to get the $2,000?

A. He came back and asked me if I am ready. I said, 'Any time you are ready, come and get it.'" (Tr. p. 192.)

"Q. Were you going to loan him the money on the basis of a mortgage or something else?

A. No. Just loaning him the money.

Q. Without security?

A. Yes." (Tr. p. 193.)

"A. I never gave him. I loaned him a check when he went up to Maui, $75 to try to see Tong.

Q. Did he borrow money from you to go up there on that?

A. Yes." (Tr. p. 194.)

Such uncontradicted and unimpeached testimony cannot be disregarded by the trial Court. *San Francisco Association for the Blind v. Industrial Aid for the Blind*, 152 F. (2d) 532; *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 51 Sup. Ct. 453, 75 L. Ed. 983.

It is submitted that a finding that Appellant had money ready and willing should have been entered by the trial Court.

Furthermore, it is submitted that by the behavior of the Appellees they made tender useless. In *H. Johnson v. T. P. Tinsdale,* 4 Haw. 605, the Court stated:

> " 'It is a general rule that when the tender or performance of an act is necessary to the establishment of any right against another party, this tender or offer is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.' "

See also

Aikoe v. F. H. Hayseldon, 6 Haw. 534, at page 537.

Dr. Tong testified as follows:

> "A. The letter was written to Chong Hing Tenn, about his conduct, cold, pulling stone faces, driving business away with that kind of mug he has, not getting along with the employees. We had a gold mine. There was a gold mine there. He would sure ruin the business.
>
> Q. After you had written the letter which you have in your hand, Petitioner's Exhibit A, did you hear any other reports about the business? Just answer that yes or no.
>
> A. Yes.
>
> Q. As a result of hearing these reports, did you do anything?
>
> A. Yes. I wrote a letter.
>
> Q. To whom did you write a letter?

A. Mr. Ching. I told him to vacate the premises.

Q. By that, what premises did you mean?

A. I mean the Green Mill there.

Q. What happened to that letter, if anything?

A. He returned that letter to me, he said he is not guilty.

Q. Do you have that letter?

A. Well, that went all through all the process in the blitz, I couldn't keep anything.

Q. You do not have possession of that document?

A. No.

Q. Now, was that letter addressed to him prior to or after his trip to Maui?

A. It was prior to his trip to Maui.

Q. Was that letter addressed to him prior or after your executed partnership agreement?

A. That letter was prior to the execution of the partnership agreement.

Q. Did you give any reasons in your letter to Ching, why you wanted Ching—

A. Yes.

Q. What was the substance of those reasons?

A. One of them that he didn't have any money in the business, another thing, his conduct, his character, so far as business is concerned, it wasn't businesslike. That he had broken faith with me. I had all confidence and faith in him, and he had betrayed my confidence. After writing this letter, I then backed him up to the limit, but I got a report from several sources——

Q. Never mind what the reports were, that is hearsay. Your testimony is that he returned that

letter to you with the notation in his own handwriting to the effect 'not guilty'?

A. I remember now. It was on the other side. The letter was a page and half in my handwriting. He wrote on the back of it, 'Not guilty.'" (Tr. pp. 346-347.)

"Q. When you wrote this letter that you told him to vacate or get out, when did you do that?

A. I think it was about around Thursday, I think.

Q. Thursday?

A. On the 9th. I think I checked these dates up. The 9th was Thursday. Monday was the 6th. That was the date, Monday afternoon. I checked on the Inter-Island at the time. My recollection of checking these things—it was in 1944, when it first came up—I got to refresh my memory, so I checked around for the date. It was hazy to me then." (Tr. p. 366.)

"Q. What prompted you to write that letter?

A. Well, adverse reports.

Q. I thought you advised me that you were not in communication with folks over here.

A. I had a letter from my brother then, answering my letter to him. Then there were people coming up for the fair. They gave me all kinds of reports of what is going on over there, that Mr. Ching was in there. He was ruining business. He has two or three shots, and then he calls all his friends in. Then he is trying to live on the house. Everything is on the house. A certain fellow seen him take a bottle out, jeopardizing the business license. There is other occasions, *too.*

Q. That is what some other people told you.
A. Reports came in from people that I told them to take a look, too." (Tr. p. 367.)

In other words by the time the letter of October 6, 1941 got to the Appellant or about one day later, on October 9, 1941, Dr. Tong made up his mind that Appellant was out. Appellant was told to vacate. Chong Hing Tenn wrote to Dr. Tong so Chong Hing Tenn must have taken the same position as Doctor Tong. This letter relating to vacating the premises is Dr. Tong's own letter so Appellees cannot deny this. Therefore, on Appellees' own admitted fact, that Appellant was told to vacate—tender was made useless. It made it certain that tender would be useless.

In addition to the foregoing admitted notice to vacate by Dr. Tong, the Appellees' very act of taking the business in their own name only without even making a proper demand on the Appellant showed an intent to "squeeze-out" the Appellant. Certainly one who intentionally and unlawfully "squeezes out" another cannot expect a court of equity to aid him with a defense of "no tender". In 52 *Am. Jur.* 218, it is stated as follows:

> "The rules concerning the necessity for an actual tender are not, as a general rule, applied with the same stringency in equity as at law. In equity the failure to make formal tender frequently may be cured by a plea of readiness and willingness and the paying of the money into court, provided a formal tender is not a condition precedent to the enforcement of the rights of the

pleader. Again, in a suit to set aside a sale of property a tender of money made in the pleadings, followed by a payment thereof into court, is a sufficient tender. *As at law, an actual tender by the debtor is unnecessary when it is plain, from the acts or conduct of the other party or the circumstances or situation of the transaction or property, that a tender would be nugatory, since equity does not require a useless and idle formality. To illustrate, where the other party has openly refused to perform in compliance with his contractual obligations, the debtor need not make a tender or demand; it is enough that he pleads his ability, readiness, and willingness, and in his pleading, offers to perform his obligations.* It has been said that uncontradicted evidence in behalf of the debtor that he is ready, able, and willing to pay whatever amount a court in equity shall determine, to whomsoever the court shall determine is entitled thereto, is sufficient to protect his rights, equally with an actual tender, where fault for the nontender or nonpayment was not his. In further illustration of the rule in equity, it has been held that a tender of the amount due on a contract for the sale of real estate is not necessary, if the vendor states that it will be useless * * *'' (Emphasis ours.)

See also:

Sherwood v. Greater Mammoth Vein Coal Co., 193 Iowa 365, 185 N.W. 279;

Rockland-Rockport Lime Co. v. Leary, 203 N.Y. 469, 97 N.E. 43;

Niedermeyer Inc. v. Fehl, 153 Or. 656, 57 P. (2d) 1086;

Comstock Mfg. Co. v. Schiffmann, 133 Or. 677, 234 P. 293.

Therefore it is submitted that both the Supreme Court and the trial Court erred in holding that Appellant's tender of $3,000.00 was necessary.

V.

THE SUPREME COURT OF HAWAII ERRED IN MAKING THE FOLLOWING FACT FINDINGS AND CONCLUSIONS.

(A) The Supreme Court of Hawaii made the following additional finding:

> "The record bears no rescission or cancellation of the original agreement which entitled the petitioner to participate *in the purchase conditioned upon the payment of his contributive share of $3,000, by any or all of the respondents, or by the petitioner himself.*" (Objectionable portion emphasized.) (Tr. p. 64.)

A careful reading of the foregoing fact finding makes one wonder what the Supreme Court of Hawaii meant. It is not only ambiguous but it doesn't make any sense. But taking it to mean that by the original agreement the Appellees could have prevented Appellant's participation in the obtaining of the legal title by paying Appellant's $3,000.00 contribution, it is submitted that the record does not permit any such construction of the original agreement.

(B) The Supreme Court of Hawaii made the following additional finding:

"Under the oral agreement with the seller *fixing the time of payment of the purchase price as October 1, 1941, a limitation of time for performance by the petitioner, during which he was to tender his contributive share, was fixed and agreed upon.*" (Objectionable portion emphasized.) (Tr. p. 64.)

The Appellant testified as follows with relation to the date of payment:

"Q. Was there anything said about when the money was to be paid in by the parties?

A. No. Nothing was said as to when the money was to be paid in.

Q. Was there anything said when you were supposed to put the $3,000 in?

A. Never said anything to me as to when to put the $3,000 in.

Q. Was it subject to Mr. Chong Hing's call?

A. At any time, subject to his call.

Q. Was that the agreement of the parties at the time?

A. That was the agreement.

Q. So far as you are concerned, then you were supposed to contribute your $3,000 when Chong Hing notified you?

A. Whenever the papers were ready, when the business was about to be consummated." (Tr. pp. 286-287.)

None of the Appellees denied this. In fact the Appellant's testimony is substantiated by Dr. Tong's letter of October 6th, 1941, Petitioner's Exhibit A, (Tr. p. 131) wherein it is stated:

"I have 15 shares and you have 3, that is if you get the dong by then." (Tr. p. 131.)

Dr. Tong testified with relation to the said letter:

> "Q. And failed to indicate to him any date within which you expect him to contribute his portion of the money, isn't that true? Your letter of the 6th does not indicate any date, does it?
>
> A. No. I held for him, I think, due on the 1st of the month." (Tr. pp. 369-370.)

His testimony following the above positively shows that he meant October 1, 1941. Dr. Tong in so testifying clearly committed perjury to mislead the trial Court.

The Supreme Court of Hawaii did not carefully review the record. Such additional findings were therefore clearly arbitrary and without supporting evidence.

(C) The Supreme Court of Hawaii made the following additional findings:

> "In addition to the fact that the experimental period of operation by the party purchasers was to terminate on October 1, 1941, *during which period the petitioner had ample opportunity to tender his contributive share*, the evidence further discloses that the sale, by way of execution of all requisite documents and transfers, was not consummated until October 20, 1941, retroactive to October 1, 1941. *The petitioner was, by operation of time and with the acquiescence of the respondents, gratuitously accorded an extra period of dispensation in which to tender his contributive share. During this twenty-day period of additional concession, the petitioner failed to perform, and has not, in our opinion and as found by the*

trial judge, established any valid reason for his default." (Objectionable portion emphasized.) (Tr. pp. 64-65.)

The Supreme Court of Hawaii in concluding and finding that there was no valid reason for Appellant's default was not aware of the law of "confidential relationship" argued in Argument I. All of Argument I and Argument IV of this brief are hereby referred to by reference. The Supreme Court again erred in making these additional findings.

(D) The Supreme Court of Hawaii made the following additional finding:

> "The letter of October 6, 1941, from Fook Hing Tong to the petitioner, fourteen days prior to the actual consummation of the sale, contains an affirmance that the original agreement between all party purchasers, including the petitioner, was still in effect, though the trial period and the *due date of the purchase price on October 1, 1941, expired six days prior thereto. The period within which the petitioner could have tendered his contributive share was thereby extended to October 20, 1941. Of this extension of time in which to perform, the petitioner was also given notice."* (Objectionable portion emphasized.) (Tr. p. 65.)

The objection that the due date was originally agreed upon as October 1, 1941 is covered by Argument V (B) so it will not be repeated here. The findings that the due date was extended to October 20th and that Appellant was given *notice* thereof is certainly not supported by the record. The Supreme Court set

October 20, 1941 as the due date because the Bill of Sale was dated as of that day. Otherwise, October 20, 1941 is of no significance. Actual notice cannot be imputed by using hindsight legal mechanics. The Supreme Court erred in using such tactics.

(E) The Supreme Court of Hawaii made the following additional finding:

> *"The purchase price was payable by the party purchasers on October 1, 1941. The petitioner, as a party to that oral agreement, was aware of and so bound, as were all the party purchasers, by this due date of payment."* (Objectionable portion emphasized.) (Tr. p. 94.)

Argument V (B) clearly covers this fact finding. Clearly the Supreme Court erred in making the foregoing finding.

(F) The Supreme Court of Hawaii made the following additional finding:

> *"The record further discloses that petitioner's right of contribution was expressly conditioned upon tender of his contributive shares as agreed upon. This he failed to do."* (Objectionable portion emphasized.) (Tr. p. 66.)

Here again it is difficult to determine what the Supreme Court meant. It must have meant right of participation instead of "contribution". Otherwise the sentence does not make any sense. Assuming that it meant participation, it is submitted that the fact finding that he failed to contribute is erroneous. Arguments I and IV are repeated here. Under said argu-

ments of breach of fiduciary duty and excuse of tender, this finding was erroneous.

VI.

THE SUPREME COURT OF HAWAII ERRED IN HOLDING THAT IT WAS NOT MATERIAL TO RULE AS TO WHETHER THERE WAS AN EXISTING PARTNERSHIP.

The Supreme Court of Hawaii held as follows:

> "Upon the entire record on review, whether or not the original oral agreement between the parties to the proceeding constituted a copartnership or joint adventure binding them with the legal incidents flowing therefrom, is not pertinent to the disposition of the issues of fact presented which are determinative of the sole question presented on appeal." (Tr. p. 67.)

It is submitted that it was obligatory upon the record for the Supreme Court to rule whether or not a partnership or joint enterprise existed.

Failure to tender one's contributive share does not necessarily prohibit a partnership. Arguments I, II, and IV are repeated herein.

CONCLUSION.

It is respectfully submitted that the decision of the Supreme Court of Hawaii be reversed and an appropriate order be entered by this Court ordering an

accounting and other relief as prayed for in Appellant's bill as filed in the trial Court.

Dated, Honolulu, Hawaii,
April 23, 1951.

Respectfully submitted,
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Appellant.